In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1521

VIBERT CLARENCE HEATH AND FRANKLIN DAVID SHEPARD, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The *per curiam* opinion of the court of appeals (Pet. App. A) and the opinion of the district court (Pet. App. B) are not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on April 24, 1972. The petition for a writ of certiorari was filed on May 22, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the search with a warrant of petitioner Shepard's house and shed was lawful.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Tennessee, petitioners and co-defendant Marvin Glenn Daugherty were convicted on six counts charging violations of federal statutes relating to nontax-paid liquor. Heath was sentenced to imprisonment for five years on each of four counts and one year on each of two counts, all to run concurrently. Shepard was sentenced as a youthful offender, pursuant to 18 U.S.C. 5010(b). The court of appeals affirmed *per curiam* (Pet. App. A).

The evidence, adduced at trial and at a hearing on petitioners' motion to suppress, showed that in 1969 Shepard, using the name J. P. Russell, leased property located on Wolf Valley Road, Anderson County, Tennessee (Tr. 66).[1] Thereafter a metal shed was constructed on a portion of the land approximately 30–40 yards from the main house (Tr. 70, 76).

Prior to December 26, 1970, Knoxville police officers Irwin and Dowling had received information that petitioner Shepard had been operating an illegal still and was hauling moonshine whiskey to Knoxville (Tr. 32). On that date the officers saw Shepard driving a white panel truck at an intersection in Knoxville, and decided to follow him (Tr. 32, 94). The surveillance led to the Anderson County property leased by Shepard, where the officers saw Shepard enter the driveway and

[1] We are lodging with this Court the transcript of the trial and the hearing on the motion to suppress, herein designated "Tr." We are lodging also the brief and appendix for plaintiff-appellee in the court of appeals, herein designated "App."

back the truck to the rear door of the residence (Tr. 95).

Two days later at dusk the officers drove federal Alcohol, Tobacco and Firearms agent Charles Riddle to the Shepard property. As soon as Riddle and Dowling exited from the car at the entrance to Shepard's driveway, they smelled a faint odor that Riddle immediately identified as mash (Tr. 52). Riddle and Dowling proceeded on foot up the driveway to within fifty yards of the house, where Riddle satisfied himself that the odor was indeed that of mash (Tr. 52–53). The officers then returned to Knoxville and on the following date secured a warrant to search the property (Tr. 53, 55).

The warrant was executed on December 30, 1970. The officers initially found a 1,000-gallon still in full operation inside the metal shed (Tr. 77). They then proceeded to the dwelling house, where they arrested petitioners and their co-defendant. In one of the rooms they found a 100-gallon still in the process of being set up, and 196 gallons of nontax-paid whiskey (Tr. 58, 78, 81). An additional 100 gallons were located in the trunk of an automobile found on the property (Tr. 83).

ARGUMENT

The sole issue presented by petitioners involves the lawfulness of the search of Shepard's premises on December 30, 1970. Petitioners advance three claims: that the description of the property on the warrant was erroneous; that the affidavit did not establish

probable cause to issue the warrant; and that even if the affidavit was sufficient, the search was unlawful because the information contained in the affidavit was secured by unlawful trespass onto the property. Each of these allegations is without merit.

1. The search warrant described the Shepard premises as follows (App. 3):

> * * * on the premises known as the John Doe residence, located by beginning at the intersection of the Wolf Valley Road and U.S. Hwy. 25W East of Clinton, Tennessee, drive North on the Wolf Valley Road, 4½ miles to a driveway, turn right on driveway and proceed 100 yards to a white frame house and all outbuildings * * *.

The description was sufficient to enable "the officer with a search warrant * * * with reasonable effort [to] ascertain and identify the place intended." *Steele* v. *United States,* 267 U.S. 498, 503. See also *United States* v. *Lee,* 448 F.2d 604 (C.A. 7), certiorari denied, 404 U.S. 858; *United States* v. *Hassell,* 427 F.2d 348 (C.A. 6). Petitioners argue, however, that according to a licensed surveyor the Shepard premises are located 4.3 miles from the Wolf Valley Road intersection, the house is rust colored, and it is 500–600 feet from the road. These discrepancies are critical, in petitioners' view, because on the neighboring property, located 4.5005 miles from the intersection, there is situated a white frame house 150–200 feet from the driveway entrance (Tr. 41–42).

The evidence viewed most favorably to the government, however, shows that the Shepard house was

white,[2] and defendant Shepard himself testified that the house was 100–150 yards from the road (Tr. 12). Moreover, the notion that the specificity of a surveyor's measurements is necessary when property is described in a search warrant [3] is at odds with this Court's ruling that technical requirements of that nature "have no proper place in this area." *United States* v. *Ventresca*, 380 U.S. 102, 108. Unlike the situations in the cases relied upon by petitioners, the officers here had no difficulty locating the exact property to be searched and did not engage in a search which exceeded the bounds of the reasonable description.

2. The affidavit sworn to by Riddle in securing the search warrant stated (Tr. App. 1–2):

> On December 28th, I received information from a reliable informant who had given me information in the past that proved reliable that a distillery was set up in the above described premise. At about 8 p.m., on December 28th, 1970, from a position in a public road near the described premise, I smelled the distinct odor of fermented mash emanating from the premise. I have been a Special Investigator with the Alcohol, Tobacco and Firearms for 12 years and am very familiar with the odor of fermenting mash.

As both courts below held, the affidavit, detailing the receipt of information from a reliable source,

[2] Agent Riddle at trial described it as a "white residence house" (Tr. 81).

[3] The mileage had been measured with the use of an automobile speedometer (Tr. 53).

coupled with the personal observations of the affiant, contained ample information for issuing the warrant.[4] *United States* v. *Harris*, 403 U.S. 573; *United States* v. *Ventresca*, 380 U.S. 102, 111; see *Johnson* v. *United States*, 333 U.S. 10, 13.

3. The contention that the officers had to enter the driveway of the premises in order to obtain probable cause fails to take into account Riddle's testimony that he detected the odor of mash initially from the public road. In any event, even if it had been necessary for the officers to commit a technical trespass upon a driveway, that circumstance should not invalidate a search warrant otherwise lawfully secured. "When the performance of his duty requires an officer to enter upon private property, his conduct, otherwise a trespass, is justifiable," and does not invalidate an arrest or search based on information obtained while on the property. *United States* v. *Knight*, 451 F. 2d 275, 278 (C.A. 5), certiorari denied *sub nom. Grubbs et al.* v. *United States*, 405 U.S. 965. See also *Monnette* v. *United States*, 299 F. 2d 847, 850 (C.A. 5).

[4] Petitioners' unsupported assertion (Pet. 9) that the informant was Knoxville police officer Dowling is contradicted by Shepard's testimony that the information was from "other than these police officers" (Tr. 54–55).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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